Office - Supreme Court, U. S.
FILED
JUL 5 1941
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1084 1105

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

vs.

LUCIUS TETER, ET AL.,
Respondents.

BRIEF OF FLETCHER M. DURBIN, ANGUS S. HIBBARD, C. M. MODERWELL, AND JOHN A. McCORMICK, CERTAIN OF THE RESPONDENTS HEREIN, IN OPPOSITION TO THE PETITION OF RECONSTRUCTION FINANCE CORPORATION FOR A WRIT OF CERTIORARI.

LELAND K. NEEVES,
W. T. DURBIN,
HERBERT H. SCHEIER,
Counsel for the above named Respondents.

THE GUNTHORP-WARREN PRINTING COMPANY, 230 WEST JACKSON, CHICAGO

INDEX.

PAGE

Opinions Below 1

Statement as to Jurisdiction 1

Question Presented 2

Statutes Involved 5, 35

Statement of the Case 5

Summary of Argument 14

ARGUMENT.

I. THE TRUST FUND DOCTRINE HAS NO APPLICATION TO THIS CASE 19

A. The stockholders of C. T. C. Investment Company, including the individual defendants herein, have not received, nor have they appropriated to themselves, any of the assets of that company to the exclusion of creditors... 19

B. In any event the trust fund doctrine does not permit a direct suit by creditors against third party debtors of a corporation 19

II. SECTIONS 14, 17, AND 53 OF THE 1919 CORPORATION ACT PRECLUDE THIS ACTION. NOR WILL THIS ACTION LIE UNDER SECTION 49 OF THE CHANCERY ACT 26

III. THE COURT BELOW HAS PROPERLY FOLLOWED THE ILLINOIS DECISIONS AS TO THE APPLICABILITY OF THE ABOVE STATUTORY PROVISIONS TO THIS CASE.. 30

CASES CITED.

Clapp v. Peterson, 104 Ill. 26 21
Consolidated Coal Co. v. Flynn Coal Co., 274 Ill. App. 405 .....16, 17, 28, 30
Dukes v. Harrison & Reidy, et al., 270 Ill. App. 372.... 27
Erie R. R. Co. v. Thompkins, 304 U. S. 64.....17, 31
Fidelity Union Trust Co., et al. v. Field, ... U. S., ..., decided December 9, 1940..... 31
Fogg v. Blair, 133 U. S. 544..... 22
Furness, Withy & Co. v. Yang-Tsze Insurance Association, 242 U. S. 430..... 32
Gottlieb v. Miller, 154 Ill. 144..... 22
Hill v. Gruell, 42 Ill. 411.....8, 19, 23, 32
Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371...21, 22
Johnson v. Canfield-Swigart Co., 292 Ill. 109..... 22
Klaxon Company v. Stentor Electric Mfg. Co., Inc., ... U. S. ....., decided June 2, 1941..... 31
Life Association of America v. Fasset, 102 Ill. 315... 25
Magnum Import Co. v. Coty, 262 U. S. 159..... 33
The Rockford Wholesale Grocery Company v. The Standard Grocery and Meat Company, 175 Ill. 89... 22
Sanger v. Upton, 91 U. S. 56..... 22
Sarelas v. McCue & Co., 291 Ill. App. 450..... 27
Sawyer v. Hoag, 17 Wall. 610..... 21
Singer & Talcott Co. v. Hutchinson, 187 Ill. 48..... 28
Smith v. Railroad Company, 99 U. S. 398.....15, 21
Standard Distilling Co. v. Coal Co., 239 Ill. 600, 605..25, 28
Stoner v. New York Life Ins. Co., ... U. S. ....., decided December 23, 1940 31

Union Mutual Life Insurance Co. v. Frear-Stone Mfg. Co., 97 Ill. 537 22

Wabash, St. Louis & Pacific Ry. Co. v. Ham, 114 U. S. 587 22

West, et al. v. American T. & T. Co., ... U. S. ....., decided December 9, 1940..... 31

Wood v. Dummer, 3 Mason 308, Fed. Cases No. 17,944. 21

STATUTES INVOLVED.

Sec. 14, 1919 Illinois Corporation Act.....5, 15, 26, 31, 35

Sec. 53, 1919 Illinois Corporation Act.....
.....5, 15, 16, 17, 21, 26, 28, 29, 31, 33, 35

Sec. 79, 1919 Illinois Corporation Act.....
.....5, 15, 16, 17, 21, 28, 29, 30, 33, 35

Sec. 49, Illinois Chancery Act.....5, 15, 16, 29, 36

Sec. 86, Illinois Business Corporation Act of 1933....29, 36

Sec. 94, Illinois Business Corporation Act of 1933.17, 29, 37

Sec. 8, 1872 Illinois Corporation Act..... 28

Sec. 10, 1872 Illinois Corporation Act.....16, 28

Sec. 11, 1872 Illinois Corporation Act..... 28

Sec. 12, 1872 Illinois Corporation Act.....15, 27, 28

Sec. 25, 1872 Illinois Corporation Act.....16, 28

Fletcher, Encyclopedia on Corporations..... 22

Cook on Corporations..... 22

No. 1084.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

vs.

LUCIUS TETER, ET AL.,
Respondents.

BRIEF OF FLETCHER M. DURBIN, ANGUS S. HIBBARD, C. M. MODERWELL, AND JOHN A. McCORMICK, CERTAIN OF THE RESPONDENTS HEREIN, IN OPPOSITION TO THE PETITION OF RECONSTRUCTION FINANCE CORPORATION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

OPINIONS BELOW.

There is no written or printed opinion of the District Court. The opinion of the Circuit Court of Appeals is reported in 117 Fed. (2d) 716, and appears in the Record beginning at page 204.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 4, 1941 (R. 222). Petitioner's petition for rehearing was denied on February 26, 1941 (R. 223). The jurisdiction of this court is invoked under section 240(a) of Judicial Code as amended.

Question Presented.

In its petition herein (p. 2) under the heading "Question Presented" petitioner states that it brought this suit as a creditor

> "to recover against the assets of a dissolved corporation which had passed into the possession of a former officer for administration and liquidation."

This statement does not correctly indicate the nature of this proceeding. Nor does petitioner's further statement (Pet. p. 2) that the

> "principal question presented is whether under Illinois law a court of equity may administer those assets as a trust fund for the benefit of creditors or whether such relief, long recognized by Illinois decisions, is precluded or limited by the provisions of certain Illinois statutes which prescribe a procedure, during a specified period after dissolution, for rights against the corporation, its officers, and stockholders"

correctly state the question or questions at issue.

Contrary to petitioner's statement, the fact is that petitioner is seeking to maintain a suit directly upon the two indemnity agreements (Exhibits VII and VIII) against the signers thereof—the individual defendants herein other than Joseph Duner and Mrs. Requa, who is sued as Administratrix of the Estate of Charles H. Requa, who was one of the signers of said agreements—as if petitioner were an actual party to those agreements. Petitioner's contention that there is any question here as to the administration of the corporate assets as a trust fund for the benefit of corporate creditors is an afterthought advanced for the first time in the court below, and even then in a different form from that in its present petition.

No contention as to any "trust fund doctrine" was made in the trial court, nor is either the original or amended complaint framed upon any such theory.

In its opinion the court below states (R. 204):

> "This equitable action was brought against the C. T. C. Investment Company and its stockholders to recover upon two guaranties executed by that company, and to recover upon two agreements executed by certain of the individual defendants who were stockholders of that company."

The above statement was taken directly from petitioner's brief in the court below and reflects the contentions which it was then making in that court.

The "trust fund doctrine" contention was evolved by petitioner in the court below solely for the purpose of enabling it to sue directly upon the said two indemnity agreements, Exhibits VII and VIII—as an alternative ground in the event its contention was not sustained that it was a third party beneficiary of those agreements. Petitioner's contention was that under the trust fund doctrine it could sue directly the debtors of the corporation.

The court below stated in its opinion (R. 214-215):

> "Appellant contends, however, that it can recover on the guaranties of the C. T. C. Investment Company, exhibits 5 and 6, against that company's property in the hands of its stockholders, although the company was dissolved more than two years prior to the filing of this action, and that in so doing it can sue the debtors of the company directly on any choses in action constituting part of its assets. This contention is based on the proposition that its bill is not a mere creditor's bill and that the dissolved corporation is not a necessary party, which fact renders immaterial, so far as other parties defendant are concerned, the court's ruling on the motion to quash.
>
> "Appellant's argument in this respect is that in equity the assets of a dissolved corporation, including its choses in action, pass to its stockholders as tenants in common; that in equity the assets of a dissolved corporation passing to its stockholders constitute a trust fund which can be reached in their hands by the corporation's creditors for the purpose of satisfying

claims; *and that therefore appellant can sue directly on those assets including choses in action.*" (Italics ours.)

In its present petition petitioner carefully avoids any clearcut statement that it is endeavoring to bring a suit directly upon Exhibits VII and VIII, but on the contrary endeavors to give the impression that it is merely endeavoring to reach corporate assets in the hands of the stockholders which they have appropriated to themselves to the exclusion of creditors. In other words petitioner, in its present petition, is endeavoring to present this controversy as a simple and typical "trust fund doctrine" action.

In answer to petitioner's contention and line of argument in the Court below these respondents pointed out, first, that nothing in the trust fund doctrine gives a corporate creditor any right to sue third party debtors of the corporation directly upon their contracts with the corporation as if it were a party to those contracts, and, second, that in any event the individual defendants as stockholders of the C. T. C. Investment Company had not received or appropriated to themselves any of the corporate assets.

The receipt by stockholders, or the appropriation to themselves as stockholders, of corporate assets, leaving debts unpaid, lies at the very foundation of the trust fund doctrine. Unless the stockholders have in fact so received or appropriated to themselves such assets there is no foundation whatsoever for applying the doctrine.

The present petition cites no authority whatsoever in support of the proposition that the trust fund doctrine applies where the stockholders have not in fact appropriated to themselves the corporate assets to the exclusion of creditors, or that under the trust fund doctrine a corporate creditor can sue third party debtors of the corporation directly upon their contracts with the corporation as if it were a party thereto.

Subject to the patent uncertainties of the present petition, we think the questions presented are as follows:

1. Does the trust fund doctrine apply where the stockholders have not in fact received or appropriated to themselves any of the corporate assets?

2. Does the trust fund doctrine permit a suit by a corporate creditor against third party debtors of the corporation upon contracts between such debtors and the corporation as if such creditor were a party to such contracts?

3. Can this suit, which is essentially a creditor's bill, be maintained in the face of sections 14, 79, and 53 of the 1919 Illinois Corporation Act and section 49 of the Chancery Act?

4. Did the Court below fail to ascertain and apply the Illinois law?

This suit was brought by petitioner solely for its own benefit and without reference to any other possible creditor of the C. T. C. Investment Company.

Statutes Involved.

The statutes directly involved are sections 14, 53, and 79 of the 1919 Illinois Corporation Act and section 49 of the Illinois Chancery Act. These sections are set out in the appendix hereto.

Statement.

The original and amended complaints were dismissed by the trial court upon motions (R. 63-105; 169-192) by the individual defendants herein (R. 192). At the same time the purported service, together with return thereof, upon C. T. C. Investment Company was quashed (R. 193). The facts appear only from the allegations of the amended complaint and from the exhibits and affidavits filed in support of the motions filed on behalf of Teter, and others (R. 70-78, 89-97, 179-187).

The facts as stated in the amended complaint[1] were as follows:

In May, 1929 Chicago Trust Company and the National Bank of the Republic, two Chicago banks, consolidated (R. 110). Each bank was to contribute an agreed amount of assets to make up the capital of the new bank (R. 111). C. T. C. Investment Company was organized in connection with said consolidation (R. 114).

Upon examination of the assets of the two banks it was found that neither bank had acceptable assets in the required amounts (R. 113-114).

Thereupon the Otte-McCreight agreement was entered into (Exhibit IV), under which the unacceptable assets were to be withdrawn from the consolidated bank "at book value", excepting that by mutual agreement certain of the assets might be left in the consolidated bank providing they were guaranteed "for definite periods" by the C. T. C. Investment Company (R. 114; 147).

Pursuant to this arrangement the C. T. C. Investment Company entered into a guaranty agreement (Exhibit V, R. 148) covering specific items shown in Exhibit A thereto (R. 148). The guaranty ran to the consolidated bank (R. 149).

As of the same date C. T. C. Investment Company entered into a further guaranty agreement (Exhibit VI, R. 154) covering any additional loans, etc., made by the consolidated bank at the instance of the C. T. C. Investment Company, and also all new loans, etc., made by the consolidated bank, the proceeds of which were to be used to pay off any of the loans listed in Exhibit A of Exhibit V (R. 155).

1. The amended complaint (R. 110) was not materially different from the original complaint (R. 2). Paragraph 36 was amended to read as hereinafter stated *infra*, p. 8. A new paragraph 38 was included (R. 125). Paragraph 38 of the original complaint (R. 18) was amended by adding the words "of said agreements and as assignee" after the word "assignee" in the second line of the paragraph. The paragraph was also renumbered 39.

The amended complaint then alleged that prior to the completion of the consolidation it appeared that an underwriting agreement had been made with reference to some Cuban bonds, which agreement was apparently a liability of the Chicago Trust Company (R. 116-117); that thereupon the individual defendants herein, except Joseph Duner, entered into the first of the so-called indemnity agreements (Exhibit VII, R. 117, 156).

The amended complaint further alleged that thereafter the C. T. C. Securities Company took over the $800,000 note which was involved in the matter of the Cuban bonds (R. 119) and that thereupon the individual defendants who had executed Exhibit VII executed Exhibit VIII (R. 119-120, 159).

The purchase of the $800,000 note was made on or about August 23, 1929 (R. 119). Exhibit VIII was entered into on October 10, 1929 and purported to relate to "any present or future purchases," etc. (R. 159).

While in both of the courts below petitioner claimed that Exhibit VII was still in effect, it seems now in its present petition to have abandoned that position inasmuch as it now refers (pet. p. 4) only to "an agreement of indemnity" and the record reference—page 159—is to Exhibit VIII. On page 5 of its petition, reference is had to "the indemnity agreement referred to above."

Notwithstanding petitioner's statement that

> "the action here • • • is not one for personal judgment against the stockholders as such, but is against them and Duner for the purpose of recovering assets of the corporation,"

the amended complaint does in fact pray for a personal judgment against the individual defendants (R. 127). While petitioner's said statement is as to the individual defendants *as stockholders*, we do not understand that any distinction is being attempted between the stockholders of the C. T. C. Investment Company *as such* and said stockholders,

as *individuals,* inasmuch as petitioner refers in that connection to the *Gruell* case as also not seeking a personal recovery against the stockholders there involved. This statement is contrary to the fact because in the *Gruell* case the creditor not only sought but actually recovered a personal decree against the stockholders for the amount of his claim.

The individual defendants are sued as *individuals,* as well as stockholders. See the following quotation of Par. 36 of the Amended Complaint.

The C. T. C. Investment Company was dissolved by decree of the Superior Court of Cook County on May 20, 1933. Paragraph 36 of the amended complaint (R. 125) alleges that at the time of the dissolution of the C. T. C. Investment Company on May 20, 1933

> "Said company was possessed of assets consisting for the most part of notes, bonds and securities, *all of said assets being the remainder of the identical assets, or proceeds thereof, delivered to the C. T. C. Investment Company on June* 29, 1939, *as surplus assets of the Chicago Trust Company;* that such remaining assets are now being administered in the name of C. T. C. Investment Company by Joseph Duner, one of the former officers of said company, under some arrangement or agreement, the terms of which are unknown to plaintiff; that such assets, though substantial, are not sufficient to pay in full the liability of C. T. C. Investment Company upon its guaranties referred to herein as Exhibits V and VI hereof; that all stockholders of the C. T. C. Investment Company have a common interest in the subject matter of this suit; that the individual defendants named herein are stockholders of the C. T. C. Investment Company, and are sued herein as individuals and as stockholders of the C. T. C. Investment Company on behalf of all stockholders thereof." (Italics ours.)

The portion appearing in the above in italics was not a part of paragraph 36 of the Complaint as originally filed

(R. 18). The amendatory matter makes it clear that the assets referred to in paragraph 36 did not include the two indemnity agreements, Exhibits VII and VIII, inasmuch as those indemnity agreements were not at any time "surplus assets" of the Chicago Trust Company and had not at any time been delivered over to the C. T. C. Investment Company by the Chicago Trust Company.

Subsequently the consolidated bank, through the instrumentality of the Chicago Trust Company, the corporate identity of which had been retained in the consolidation, merged with the Central Trust Company, the new bank becoming Central Republic Bank and Trust Company. (Amended Complaint, paragraphs 25, 26; R. 120-121.)

The amended complaint states (Par. 25 thereof, R. 120-121) that all of the assets of the old consolidated bank were transferred to Chicago Trust Company, and that included in said assets were the loans listed in Exhibit A to Exhibit V and all the new loans, etc., the proceeds of which were used to pay off the loans so listed in Exhibit A to Exhibit V, together with the guaranty agreements Exhibits V and VI and the indemnity agreements Exhibits VII and VIII; that by virtue of the merger with the Central Trust Company said loans and said guaranty and indemnity agreements became vested in the Central Republic Bank and Trust Company (R. 121), and that the last named company thereupon by Exhibit X (R. 164) transferred to petitioner all of said loans and guaranties (R. 123).

Neither the original nor the amended complaint alleges in any way that petitioner's claims, whatever they might be, against C. T. C. Investment Company because of that company's said guaranty agreements (Exhibits V and VI) have ever been adjudicated or reduced to judgment.

Petitioner's right to enforce said guaranties was challenged in both of the courts below. Exhibit V was a specific guaranty to the consolidated bank (R. 149) notwith-

standing the further provision that the guaranty should inure to the benefit of the successors and assigns of the consolidated bank (R. 149). Said last provision, however, does not of itself mean that the guaranty itself runs to the successors and assigns of the consolidated bank. Exhibit VI was also evidently intended as a specific guaranty to the consolidated bank (R. 155), also with the provision that the guaranty should inure to the benefit of the successors and assigns of that bank. It does not follow as a legal proposition that the transfer of the loans specified in Exhibit V, in Exhibit A thereto, carried with it the guaranty itself. Exhibit X (R. 164), executed by Central Republic Bank and Trust Company in June 1932 as part of the so-called Dawes Loan, purported to assign to petitioner all of assignor's assets other than those comprised in the designation "Total Cash Means." The complaint merely alleges that such item "Total Cash Means" did not include any of the notes or guaranties described in the complaint (R. 123).

In June 1934 the said last named bank (its name having theretofore been changed to Central Republic Trust Company (R. 124)) executed Exhibit XI whereby the first guaranty agreement of the C. T. C. Investment Company was assigned to petitioner (R. 165).

Subsequently in June 1939 on the very eve of this suit the receiver of Central Republic Trust Company executed an assignment to petitioner of the two indemnity agreements (Exhibits VII and VIII) signed by the individual defendants (Exhibit XII, R. 167). The complaint does not show that the Receiver had any title to said agreements or any right to assign them.

C. T. C. Investment Company was dissolved by decree of the Superior Court of Cook County in May 1933 (R. 125).

The present suit was brought in June 1939, more than

six years after the C. T. C. Investment Company was dissolved.

Neither the original nor amended complaint alleges in any way that any of the stockholders of C. T. C. Investment Company, including the signers of Exhibits VII and VIII ever received or ever had in their possession at any time any of the assets which belonged to the C. T. C. Investment Company at the time of its dissolution. The amended complaint asserts a right in petitioner as a creditor of C. T. C. Investment Company to a personal judgment in its own favor upon the two indemnity agreements (Exhibits VII and VIII) against the signers thereof (R. 127).

The judgment of the District Court sustaining the motions to quash the purported service of summons upon the C. T. C. Investment Company, and the return upon such service, and to dismiss the complaint as to the individual defendants was affirmed by the court below (R. 192; 222).

In its brief filed in the District Court, petitioner characterized the nature of this proceeding as follows:

> "Plaintiff brings suit upon the following theories:
>
> "(a) That the contracts signed by Charles H. Requa and the other individual defendants except Joseph Duner, Exhibits VII and VIII of the complaint, are contracts made for the direct benefit of the National Bank of the Republic of Chicago, its successors and assigns, and enforcible by them, and
>
> "(b) That Exhibit IV of the complaint, the Otte-McCreight proposition, created a trust of the surplus assets of Chicago Trust Company for the purpose of making good certain questioned loans of Chicago Trust Company accepted by the National Bank of the Republic of Chicago, which surplus assets are now in the hands of the defendant Joseph Duner."

And further:

> "That portion of the Bill of Complaint which seeks to enforce the trust is an action *in rem* against the

property alleged to be in the hands of Joseph Duner. Because of the fact that that property was nominally owned by the C. T. C. Investment Company, a corporation, the stockholders of that corporation have an interest in that property. For that purpose the stockholders, as a class, have been named defendants but that does not make the bill a stockholders' suit within the meaning of Rule 23-B of the Federal Rules of Civil Procedure. The plaintiff does not claim to be or ever to have been a stockholder of the C. T. C. Investment Company.

"The defendants in their motions to dismiss have erroneously concluded that the Bill of Complaint is a creditors' bill seeking some affirmative relief against the C. T. C. Investment Company, and that because of the dissolution of the C. T. C. Investment Company the bill must fail. The Bill of Complaint is not a creditors' bill. The C. T. C. Investment Company is named as a defendant in the bill only for the purpose of barring such right as it may have in assets alleged by the Bill of Complaint to be held by Joseph Duner and to be impressed with the lien of a trust created under Exhibit IV to the complaint. No other relief is sought against the C. T. C. Investment Company."

In a supplemental brief in the District Court, petitioner stated:

"As pointed out in the plaintiff's original brief no relief is prayed against the C. T. C. Investment Company excepting the barring of whatever rights it may have in assets which the bill seeks to have declared to be trust funds, and of which the bill of complaint says the C. T. C. Investment Company was trustee."

In the court below petitioner abandoned its claim that the Otte-McCreight agreement (Exhibit IV, R. 147) created an express trust in the surplus assets of the Chicago Trust Company. In lieu thereof, and, as we have said, apparently for the purpose of finding alternative support for its claim that it could directly sue upon Exhibits VII and VIII in case its "third party beneficiary" theory were

overruled, petitioner for the first time made its so-called "trust fund doctrine" contention, urging in that regard, as we have pointed out, that under that doctrine petitioner as creditor could sue directly the debtors of the C. T. C. Investment Company. See excerpt from the opinion below, *supra*, pp. 3-4.

Petitioner, on page 5 of its petition, states that it brought this suit to recover upon the guaranties of the C. T. C. Investment Company of the notes, etc., pledged by Central Republic Bank and Trust Company, and that among the defendants named were the C. T. C. Investment Company and Joseph Duner

> "and the individuals who executed the indemnity agreement referred to above."

We are constrained to say that the foregoing statement is lacking in candor and frankness both as to the nature of the proceeding and as to the status of the individual defendants in this case.

Aside from the allegations in paragraph 36 of the amended complaint which, with considerable ambiguity, was apparently intended as a means merely of foreclosing any right that the C. T. C. Investment Company or its stockholders might have in the surplus assets of Chicago Trust Company there mentioned,[1] petitioner's effort here is to assert a right to sue the signers of Exhibits VII and VIII upon those contracts as if it were a party thereto. So far as those contracts are concerned petitioner in its present petition is seemingly at least trying to avoid a disclosure to this court as to the real nature of this proceeding.

---

1. In the light of petitioner's statements in its briefs in the District Court these respondents offered to disclaim any interest that they might have in such assets. At that time, however, petitioner was asserting a right to bring suit on Exhibits VII and VIII as third party beneficiary thereof.

SUMMARY OF ARGUMENT.

I.

The trust fund doctrine has no application to this case. The stockholders of C. T. C. Investment Company, including the individual defendants herein, have not received nor have they appropriated to themselves any of the assets of that company to the exclusion of its creditors. The complaint herein alleged in paragraph 36 that at the time of the dissolution of C. T. C. Investment Company it had in its possession certain surplus assets which had been turned over to it by Chicago Trust Company, one of the constituent banks in the consolidation, that such assets were at the time of the filing of the complaint being administered in the name of C. T. C. Investment Company by Joseph Duner, one of the former officers of the company, under some arrangement, the terms of which were unknown to petitioner, that such assets, though substantial, were not sufficient to pay in full the liability of C. T. C. Investment Company upon its guaranty agreements, Exhibits V and VI, that all stockholders of the C. T. C. Investment Company had a common interest in the subject matter of the suit, and that the individual defendants named herein were stockholders of C. T. C. Investment Company and were sued as individuals and as stockholders of the C. T. C. Investment Company on behalf of all the stockholders thereof.

The trust fund doctrine presupposes that corporate assets have been appropriated to themselves by the stockholders to the exclusion of creditors. The trust fund doctrine in its simplest form simply means that corporate property must first be appropriated to the debts of the company before any portion of it can be distributed to the stockholders. This court has so held. Such is also the law in Illinois.

Nothing in the trust fund doctrine permits a corporate creditor upon dissolution to sue third party debtors of the corporation directly upon their contracts with the corporation as if such creditor were a party to such contracts. The appropriate remedy is a creditors' bill. The fact that the individual defendants herein other than Joseph Duner had entered into the indemnity agreements, Exhibits VII and VIII, with C. T. C. Investment Company is no reason for permitting petitioner to sue said defendants upon those agreements as if it were a party thereto. Although petitioner may be a creditor of C. T. C. Investment Company it has not reduced its claim against that company to judgment, and it has no lien of any kind upon the assets of C. T. C. Investment Company. Petitioner's case as against the signers of Exhibits VII and VIII is therefore nothing but a common creditors' bill. Cf. *Smith* v. *Railroad Company*, 99 U. S. 398; Opinion below. (R. 215.)

The signers of Exhibits VII and VIII, although also stockholders of C. T. C. Investment Company, did not come into possession of any of the C. T. C. Investment Company assets upon the dissolution of that company merely because they were stockholders of that company, or merely because they were under contract obligation to it. Nothing in the trust fund doctrine furnishes any support for the contention that the signers of Exhibits VII and VIII, as stockholders of the C. T. C. Investment Company, came into possession of their own contract obligations. Nothing in the trust fund doctrine permits a corporate creditor to bring a direct suit against third party debtors of the corporation.

II.

Sections 14, 79, and 53 of the 1919 Corporation Act preclude this action. Nor will this action lie under section 49 of the Chancery Act. Section 12 of the 1872 Corporation

Act preserved as against dissolution rights and remedies of corporate creditors against the corporation, its directors and stockholders for any liability incurred prior to such dissolution. Under that section the Illinois courts held that suits *against* the corporation were subject only to the general statute of limitations, and that the 2-year limitation period in section 10 of the Act did not apply. When the 1919 Act was passed section 12 of the earlier Act was carried forward as section 79 of the new Act, with the further express provision that such suits and remedies were not barred by dissolution provided suit is brought and service of process had within two years from the time of dissolution.

Section 79 does not of itself create any remedies, but simply preserves remedies otherwise available and existing. Section 53 of the 1919 Act which carried forward the first portion of section 25 of the 1872 Act is not limited to the enforcement of unpaid stock liability or other statutory liability, but applies to cases where stockholders have made themselves liable in equity for corporate debts by reason of having appropriated to themselves the corporate assets. Section 53 expressly requires that the corporation be made a party defendant. Under these various provisions of the 1919 Act the Illinois Appellate Court has held in a series of cases that suits may not be brought against the stockholders after two years from the time of dissolution. These holdings were based upon the ground that the 2-year limitation period in section 79 was not a mere statute of limitations, but was an integral part of the cause of action itself. In one of these cases, *Consolidated Coal Co.* v. *Flynn Coal Co.*, 274 Ill. App. 405, the claim was made not only for unpaid stock liability but for liability under the trust fund doctrine. The court nevertheless held that the action could not be maintained.

Section 49 of the Chancery Act requires a judgment and return of execution as a condition to the suit.

The court below properly gave effect to the Illinois law as evidenced by the Appellate Court decisions in question, as it was required to do under the rule of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64.

None of the cases relied upon by petitioner involve any construction or application of section 79 of the 1919 Act in conjunction with section 53 thereof.

The 1933 Corporation Act carried forward into section 94 thereof the provisions of section 79 of the 1919 Act. The omission in the 1933 Act of section 53 of the 1919 Act is immaterial. The rights of the litigants herein are governed by the 1919 Act under which C. T. C. Investment Company was organized and dissolved. The 1933 Act provides a completely different scheme for the dissolution of corporations and can have no controlling effect upon the dissolution of a corporation occurring prior to the time the Act was passed.

III.

The court below properly followed the Illinois decisions as to the applicability of the Illinois statute. Petitioner's statement that the failure of the court below to ascertain and apply the law of Illinois warrants review by this court has no support whatsoever. The court below did ascertain and apply the law of Illinois to this case.

The second ground urged, which is in effect that the court below misinterpreted and misapplied the Illinois law, is inconsistent with the first ground claimed.

If there were any ground whatsoever for the first claimed reason for the granting of the writ the only action of this court would be to send the case back to the court below for the purpose of deciding it in accordance with the Illinois law. But in that event it is obvious that the conclusion of the court below would be the same and its opinion would undoubtedly be the same.

Petitioner's real complaint here is that the decisions of the Appellate Court in question construe the statute in a manner different from that contended for by petitioner.

There is no adequate ground for the granting of the writ of certiorari herein. The writ is not intended merely to provide an additional hearing to a litigant who is defeated in the court below—even though it happens to be a Governmental agency. In the absence of any supporting brief by petitioner it is almost impossible to ascertain what its legal theory is as to why it has a right to sue the signers of Exhibits VII and VIII upon those contracts as if it were a party thereto. Petitioner has shifted its position throughout this case. The "trust fund doctrine" contention was not presented at all in the District Court, and neither the original nor the amended complaint is framed upon any such doctrine. Its chief reliance in both of the courts below was that it was a "third party beneficiary" of Exhibits VII and VIII. That claim was overruled by both courts and is now abandoned by petitioner in this court. Its "trust fund doctrine" contention was made for the first time in the court below where the argument was that legal title to corporate assets vested in the stockholders upon dissolution, that corporate assets are a "trust fund" for the payment of corporate debts and that *therefore* a corporate creditor, upon dissolution, may sue third party debtors of the corporation directly upon their contracts. The contention in that form also seems now to have been abandoned by petitioner. Its present petition is framed upon a materially different theory which is wholly without support in fact. The present petition does not disclose the real nature of this proceeding. It reads as if this were merely a proceeding to reach corporate assets which the stockholders have appropriated to themselves in fraud of creditors. No such case is presented by the complaint, nor was any such case argued or presented to the court below.

ARGUMENT.

I.

THE TRUST FUND DOCTRINE HAS NO APPLICATION TO THIS CASE.

A. THE STOCKHOLDERS OF C.T.C. INVESTMENT COMPANY, INCLUDING THE INDIVIDUAL DEFENDANTS HEREIN, HAVE NOT RECEIVED, NOR HAVE THEY APPROPRIATED TO THEMSELVES, ANY OF THE ASSETS OF THAT COMPANY TO THE EXCLUSION OF CREDITORS.

B. IN ANY EVENT THE TRUST FUND DOCTRINE DOES NOT PERMIT A DIRECT SUIT BY CREDITORS AGAINST THIRD PARTY DEBTORS OF A CORPORATION.

In its petition herein (p. 12) petitioner, paraphrasing the case of *Hill* v. *Gruell*, 42 Ill. App. 411, says in effect that the present complaint seeks to charge the individual defendants as trustees. We ask, trustees of what? They have none of the property or assets of the C. T. C. Investment Company and never had any of such property or assets. That the individual defendants were the signers of Exhibits VII and VIII and therefore might have been or were under some species of contract obligation to the C. T. C. Investment Company obviously does not constitute them trustees of the property and assets of that company, or of their own contract obligation.

Nothing that petitioner says or fails to say in its petition herein can change the fact that this suit is plainly an effort on petitioner's part to maintain an action upon Exhibits VII and VIII and to enforce those contracts as contracts against the signers thereof precisely as if the petitioner were a party thereto.

In urging its "trust fund doctrine" contention, in one form or another, petitioner seems to treat this case as if

the signers of Exhibits VII and VIII had actually paid into the C. T. C. Investment Company the respective amounts for which they were obligated under those two agreements, and as if the C. T. C. Investment Company had thereupon repaid those amounts back to the individual defendants.

Petitioner's whole contention seems to be based upon this *imaginary and non-existent* payment of $800,000 to the C. T. C. Investment Company by the signers of Exhibits VII and VIII and the *imaginary and non-existent* distribution or repayment of that sum of money back to them. But it otherwise sufficiently appears in this record that there are stockholders of C. T. C. Investment Company other than the signers of Exhibits VII and VIII, so that if the dissolution of that company and, as petitioner argued, the automatic vesting of *legal title* in the stockholders at large of that company upon such dissolution, renders the trust fund doctrine applicable, then it would necessarily follow that the whole body of stockholders would have to be charged with the aggregate obligation of $800,000 under Exhibits VII and VIII, and the individual defendants would be charged not for the amounts of their respective commitments under Exhibits VII and VIII, as petitioner here seeks but merely for their pro rata share *as stockholders* of such aggregate amount.

But this argument reduces the case to an absurdity. These other stockholders would thus be charged with their proportionate parts of the sum of $800,000 which C. T. C. Investment Company, the corporation, never received and never possessed, much less distributed or paid over to the stockholders.

The court below said in its opinion (R. 215):

> "Whether or not the complaint in this action amounts to a mere creditors' bill, it is worthy of note that but for the lack of an allegation of a judgment and an unsatisfied execution the bill and its prayer have all the necessary averments of a creditors' bill."

And in that connection the court quoted from the decision of this court in *Smith* v. *Railroad Company*, 99 U. S. 398, wherein it was said:

> "The relationship of the complainant to the company is that he is its creditor while the county is assumed to be, and perhaps is, its debtor. The complainant has no lien upon the fund he is seeking to reach. His case is, therefore, a common creditor's bill—nothing more and nothing less."

The individual defendants have contended throughout that notwithstanding petitioner's protestations to the contrary the action here sought to be maintained by petitioner so far as the signers of Exhibits VII and VIII were concerned was essentially a creditor's suit and that such action could not be maintained in the face of the Illinois statute which requires in such case that the corporation be made a party defendant (Sec. 53, 1919 Illinois Corporation Act) and that the action must be brought and service had within two years from the time of dissolution (Sec. 79, 1919 Illinois Corporation Act).

Petitioner complains that the court below cited and quoted at length from *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, and it seems to contend that the Illinois courts have a different conception of the trust fund doctrine than does this court. Furthermore petitioner makes the most remarkable statement in its petition, commencing at the bottom of page 5, that the court below thought that the *Hollins* and *Smith* cases

> "so modified the trust fund doctrine that it could no longer be used to preserve the rights of creditors."

If the literalness of Mr. Justice Story's remarks in *Wood* v. *Dummer*, 3 Mason 308, Fed. Cases No. 17,944, has been modified or limited it was done by this court and not by the court below. Undoubtedly at times Judge Story's remarks were received with almost complete literalness of meaning. (*Clapp* v. *Peterson*, 104 Ill. 26; *Sawyer* v. *Hoag*,

17 Wall. 610; *Sanger* v. *Upton*, 91 U. S. 56.) Nevertheless just as this court was finally compelled to limit his pronouncements (*Wabash, St. Louis & Pacific Ry. Co.* v. *Ham*, 114 U. S. 587; *Fogg* v. *Blair*, 133 U. S. 544; *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371) so the Illinois court did likewise. (*The Rockford Wholesale Grocery Company* v. *The Standard Grocery and Meat Company*, 175 Ill. 89.)[1]

In point of fact the Illinois law on the trust fund doctrine does not differ materially from the law as announced by this court, and the short excerpt quoted below from *Fogg* v. *Blair* makes it obvious that the trust fund doctrine furnishes no support for an action brought by a corporate creditor directly against third party debtors of the corporation. The appropriate remedy there is a creditor's bill, or a bill in the nature thereof.

Furthermore, petitioner, as does the court below, refers to *Gottlieb* v. *Miller*, 154 Ill. 144, and *Johnson* v. *Canfield-Swigart Co.*, 292 Ill. 109, as recognizing the doctrine in this state—even though we can not determine from the petition with any certainty whether those cases are being criticized by petitioner or not.

For a complete discussion of the trust fund doctrine with its various ramifications we refer the court to Fletcher, Encyclopedia on Corporations, sections 7379 *et seq.*, and especially sections 7374, 7375, 7376, 7381 and 7384. See also Cook on Corporations, 8th Ed., Vol. 1, p. 49.

In *Union Mutual Life Insurance Co.* v. *Frear-Stone Mfg. Co.*, 97 Ill. 537, it was said (p. 547):

> "The capital stock of a corporation by most recent decisions is a trust fund that the directors may not

1. In the case last mentioned, the Illinois court quoted the following excerpt from *Fogg* v. *Blair*, 133 U. S. 544:

> "That doctrine [the trust fund doctrine] only means that the property must first be appropriated to the debts of the company before any portion of it can be distributed to the stockholders."

give away or misappropriate to the prejudice of the parties whom they have invited to deal with the corporation."

Have the individual defendants who were stockholders of the Investment Company and signers of Exhibit VIII come into possession of their own obligations under that contract, or have they taken over to themselves or misappropriated any of the corporate property or assets? It would seem unnecessary to have to argue that the signers of Exhibit VIII, whether they were stockholders of the Investment Company or not, have not come into possession of their own obligations in the sense of making applicable the trust fund doctrine. The only other assets of the Investment Company referred to in the complaint are the so-called surplus assets, or what remains thereof, which were transferred to the Investment Company by the Chicago Trust Company in June, 1929 (Amended Complaint, par. 36, R. 125). But the allegation there is that those assets are in the possession of Joseph Duner for purposes of administration. Possession in Joseph Duner for those purposes necessarily excludes any possession of those assets by the individual defendants herein or by the stockholders, at large, of C. T. C. Investment Company for their own purposes, and necessarily excludes any idea that the stockholders of C. T. C. Investment Company have appropriated any of such assets to themselves at the expense of corporate creditors.

In *Hill* v. *Gruell*, 42 Ill. App. 411, which seems to be petitioner's chief reliance, and which was decided long prior to the adoption of section 79 of the 1919 Illinois Corporation Act, Gruell had made a contract with the Eagle Packet Company, an Illinois corporation, whereby Gruell turned over to the company certain property as collateral security for the payment of a promissory note. The company was to dispose of the property and after paying certain charges was to pay the note and return any

excess to Gruell. The property was so sold by the company, leaving an excess belonging to Gruell—all of the proceeds being turned over to the company's treasurer. Thereupon the stockholders caused a Missouri company to be organized, of the same name, and caused all of the property and assets of the Illinois company to be transferred to the Missouri company. The stockholders of the Illinois company became stockholders of the Missouri company in the same relative proportions, although the number of shares and the par value thereof was decreased. Gruell sued the Illinois company and obtained a judgment against it for some fourteen hundred dollars ($1400.00), upon which judgment execution was issued and returned *nulla bona*. Thereupon Gruell filed a bill against the Missouri Company and against the stockholders thereof for the collection of the said judgment. Upon final hearing the court rendered a personal decree against the stockholders for the amount of Gruell's judgment, with interest thereon and costs. No decree went directly against the corporation. The court said that the transfer of the assets to the Missouri company and the receipt by the stockholders of the stock thereof

> "in purpose and direct effect was a dividend and distribution of these assets by the company to its own stockholders *pro rata*, the constituents of the two companies being precisely the same; and of this dividend each of the appellants received more than was sufficient to pay the claim of appellee. This claim arose before the attempted dissolution. It therefore could have no effect to prejudice any right of the creditor. [Citing section 12 of the Illinois Corporation Act.] They knew the company then had no means with which to make payment, having themselves, with others, appropriated its assets. They therefore became liable jointly and severally as trustees to pay it since each had received of the assets enough for that purpose; and their failure to pay it was a breach of that trust, whether fraudulent in fact or not."

The court there treated the matter as the distribution, by way of dividends, of all of the corporate assets, leaving Gruell's judgment and claim unpaid, and an appropriation by the stockholders to themselves of the corporate assets, leaving corporate debts unpaid. The situation there was not in any degree comparable to that in the instant case, nor is that case any support for petitioner's contention that it can sue third party debtors of the corporation upon contracts to which it is not a party. That corporate stockholders, by appropriating to themselves the corporate assets, leaving corporate debts unpaid, make themselves liable in equity for the amount of those debts to the extent of the assets received, was expressly held in *Standard Distilling Co.* v. *Coal Co.*, 239 Ill. 600, 605. In that case the action was brought under section 25 of the 1872 Act, and the Illinois court said that while section 25 was intended to provide a convenient remedy to enforce the liability of the stockholders as such, nevertheless the section also applied where stockholders had made themselves liable in equity for the corporate indebtedness by reason of having appropriated to themselves the corporate assets.

In other words, the last case above supports the proposition that an action founded upon the trust fund doctrine is subject to section 53 of the 1919 Act—the equivalent section so far as material here, to section 25 of the 1872 Act—and necessarily to other statutory regulation or restriction. In fact the clear import of the opinion in *Life Association of America* v. *Fasset*, 102 Ill. 315, is that the rights and liabilities of corporate creditors and stockholders are subject to legislative control (pp. 323-4).

If petitioner were consistent in its contentions, it would be contending in this proceeding that the individual defendants herein, who were stockholders of C. T. C. Investment Company, were liable—at least in equity—for the debts and obligations of that company upon its two guaranty agreements (Exhibits V and VI)—provided that it

was shown that said defendants in fact received any part of the corporate assets. The Complaint, however, makes no such case as against these defendants.

It will be further noted that in *Hill* v. *Gruell* the court cited section 12 of the 1872 Act, saying that the dissolution of the Packet Company "could have no effect to prejudice any right of the creditor." Is there any reason to suppose that had section 12 contained the 2-year limitation period, which was added to that section when the 1919 Act was adopted (section 79), the Appellate Court would have given no recognition to such restrictive provision?

It does not seem to us that upon any fair reading of the *Gruell* case it would be supposed that the court had any thought that actions of the kind there involved were not subject to the regulatory provisions or restrictions of the statute.

II.

SECTIONS 14, 79, AND 53 OF THE 1919 CORPORATION ACT PRECLUDE THIS ACTION. NOR WILL THIS ACTION LIE UNDER SECTION 49 OF THE CHANCERY ACT.

Section 14 of the 1919 Corporation Act continues the corporate existence of dissolved corporations for a period of two years for purposes of liquidation, etc. Section 79 of the Act preserves as against dissolution

> "any remedy given against such corporation, its officers or stockholders, for any liabilities incurred previously to its dissolution if suit is brought therefor and service of process had within two years after such dissolution."

Section 53 of the Act provides that in the event of dissolution or cessation of business leaving debts unpaid

> "any creditor may bring suit in equity * * * on behalf of himself and all other creditors of the corporation against all persons who are liable in any way for the debts of the corporation by joining the corporation in such suit. * * *"

In three cases the Illinois Appellate Court has construed these sections as barring actions against dissolved corporations or their stockholders after two years from the time of its dissolution. *Dukes* v. *Harrison & Reidy, et al.*, 270 Ill. App. 372; *Consolidated Coal Co.* v. *Flynn Coal Co.*, 274 Ill. App. 405; *Sarelas* v. *McCue & Co.*, 291 Ill. App. 450.

In *Consolidated Coal Co.* v. *Flynn Coal Co., supra,* the bill of complaint, in addition to claiming an unpaid stock liability on the part of the stockholders also asserted a claim against the stockholders of the transferring corporation because of the fact that they had taken over the corporate assets leaving the corporate debts unpaid. That the court below recognized that such claim was made and that reliance was being had upon the trust fund doctrine, clearly appears from the fact that the court discussed the doctrine at some length in its opinion, saying:

> "There is no dispute that by the common law doctrine of the status of a corporation after its dissolution for any cause, the corporation has no legal existence, and the real estate held by the dissolved corporation reverts to the grantors or donors, and the personal property escheats to the kind, and that no right of action can be maintained to enforce a claim against a defunct corporation. In the United States, however, this common law doctrine has been so modified that the property of a dissolved corporation is to be used for the benefit of the creditors and stockholders after dissolution, and generally, by a saving clause, stockholders or creditors may maintain an action for that purpose, and in order to maintain an action it must be filed within the time fixed for such purpose, in the instant case, by the saving clause, complainant was granted statutory right to maintain an action of the character before this court."

Section 12 of the 1872 Corporation Act did not contain the two-year limitation period and the Illinois courts had held under that Section that suits against a dissolved cor-

poration were subject only to the general statute of limitations (*Singer & Talcott Co.* v. *Hutchinson*, 176 Ill. 48). We can conceive of no clearer expression of legislative intent than the deliberate addition, when the 1919 Act came to be passed, of the two-year limitation period.

The 1872 Corporation Act provided in section 8 thereof for stockholder liability for the unpaid portion of their stock, and in the event of assignment that both assignor and assignee would be liable. Section 25 of that Act provided, among other things, that if a corporation should dissolve or cease doing business, leaving debts unpaid, suits in equity might be brought

> "against all persons who were stockholders at the time or liable in any way for the debts of the corporation by joining the corporation in such suit."[1]

Section 10 of the 1872 Act provided that corporations whose powers had expired by limitation or otherwise

> "shall continue their corporate capacity during the term of two years for the purpose only of collecting the debts due said corporation and selling and conveying the property and effects thereof."

Section 11 of said Act provided that such corporations

> "shall use their respective names for the purposes aforesaid, and shall be capable of prosecuting and defending all suits in law or equity."

Section 12 of said Act provided that the

> "dissolution for any cause whatsoever of any corporation created as aforesaid shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution."

Section 14 of the 1919 Illinois Corporation Act combined sections 10 and 11 of the 1872 Act. Section 79 of the 1919 Act was the same as section 12 of the 1872 Act,

1. As stated, it was held in *Standard Distilling Co.* v. *Coal Co.*, 239 Ill. 600, 605, that section 25 was not limited to the enforcement of unpaid stock liability.

except that it added the requirement as to the bringing of suits and the service of proof within two years from the time of dissolution.

Section 53 of the 1919 Act carried forward the first half of section 25 of the 1872 Act with some changes in wording. Section 53 provided, among other things, that after dissolution or cessation of business, leaving debts unpaid, any creditor might bring suit in equity on behalf of himself and all other creditors of the corporation

> "against all persons who are liable in any way for the debts of the corporation by joining the corporation in such suit."

Section 49 of the Chancery Act provides that whenever an execution shall have been issued against the property of a defendant on a judgment at law or in equity and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a complaint against such defendant and any other person to compel the discovery of any property or thing in action belonging to the defendant, etc., and that the court shall have power "to decree satisfaction of the sum remaining due on such judgments out of any personal property, money or things in action belonging to the defendant, or held in trust for him * * * whether the same were originally liable to be taken in execution at law or not * * *".

In its present petition petitioner seems also to have abandoned its claim that the provisions of the 1919 Act do not apply and that its right to maintain this suit is governed by the so-called Business Corporation Act of 1933. That question is discussed at length by the court below (R. 213) and we only add to what is there said by pointing out that the substance of section 79 of the 1919 Act was carried forward into the 1933 Act, in section 94 thereof.

Petitioner suggests that section 79 relates to the "statutory liabilities" of officers and stockholders (Pet. p. 11).

Reference is had to the *Flynn Coal Co.* case. But that case, as we have pointed out, clearly regards section 79 as applicable to cases involving the "trust fund doctrine." Furthermore, section 79 by its very terms does not admit of petitioner's suggested interpretation. Section 79 of itself does not create any liability or remedy. It merely preserves as against dissolution any liability otherwise existing and any remedy otherwise appropriate and applicable. It would be difficult to conceive of any broader language than that contained in section 79 in preserving rights and remedies against corporations and their directors and stockholders in the event of dissolution—subject only to the time limitation there expressed.

Nowhere in its petition does petitioner explain its delay in asserting its claims against C. T. C. Investment Company or against its stockholders or against its debtors. As the Appellate Court pointed out in construing the 1919 Act the 2-year limitation period in section 79 is not a mere statute of limitations but is an integral part of the cause of action. Petitioner has failed to bring itself within the terms of the statute. Its delay was of its own volition. The penalties thereof, if any, are not to be visited upon the individual defendants herein.

III.

THE COURT BELOW HAS PROPERLY FOLLOWED THE ILLINOIS DECISIONS AS TO THE APPLICABILITY OF THE ABOVE STATUTORY PROVISIONS TO THIS CASE.

The petition herein seems to assert two grounds for the granting of the writ. First (Pet. p. 6), that the

> "failure of the court below to ascertain and apply the law of Illinois warrants review by this court,"

and, second, if we understand it correctly, that the decision of the court below was contrary to the Illinois law. The second ground, however, is not in reality a separate and

additional ground for the writ. In truth it is inconsistent therewith. If the court below has in fact failed to ascertain and apply the Illinois law then the only order which this court would enter upon final hearing would be a direction to the court below to consider and decide the case in conformity to the Illinois law. *Klaxon Co.* v. *Stentor Electric Mfg. Co., Inc.*, ... U. S. ....., decided June 2, 1941. The question would seem to be, therefore, as to whether the court below in deciding this case proceeded contrary to the rule in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64. That the court below was fully aware of that case and its requirements is shown by the following statement in its opinion:

> "However, we cannot concern ourselves with statutes and decisions of other states in view of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64. Under the Illinois laws, in order to grant any relief demanded we think that the C. T. C. Investment Company was an indispensable party defendant in view of the allegations of the bill and the specific relief sought by the prayer which asked no general relief. However we are convinced by the same authorities that it could not be joined because it had already been dissolved for more than two years. Hence the motions to quash and to dismiss were properly sustained." (Rec. 214.)

Under the rulings of this court the Federal courts are required to follow state intermediate courts of appeal in determining the law of the state. (*West, et al.* v. *American T. & T. Co.*, ... U. S. ....., decided December 9, 1940; *Fidelity Union Trust Co., et al.* v. *Field*, ... U. S. ....., decided December 9, 1940; *Stoner* v. *New York Life Insurance Co.*, ... U. S. ....., decided December 23, 1940.)

As to the second supposed ground for the writ petitioner cites no Illinois cases whatsoever holding contrary to those of the Appellate Court expressly construing and applying sections 14, 53 and 79 of the 1919 Act. Obviously the court below was bound to follow those de-

cisions as it did. The petitioner's real complaint seems to be that the Appellate Court has a different view of the statute than has petitioner. As has heretofore been pointed out, *Hill* v. *Gruell*, the one case upon which petitioner so strongly relies, is in no way contrary to the Illinois decisions in question. The statute in force when that case was decided did not contain the two-year limitation which was deliberately put into section 79 when the 1919 Act was passed. And in its factual situation, the *Gruell* case is in no way comparable to the case at bar.

Conclusion.

In *Furness, Withy & Co.* v. *Yang-Tsze Insurance Association*, 242 U. S. 430, 433-434, this court took occasion to say:

> "* * * Nevertheless, in the circumstances, we think it was incumbent upon counsel for both sides to see that the petition and reply thereto disclosed the real situation. The oversight has resulted in unfortunate delay and needless consumption of time.
>
> "During the last term one hundred fifty-four petitions for certiorari were presented and acted upon. Because of recent legislation—Act of September 6, 1916, c. 448, 39 Stat. 726—their number hereafter may greatly increase. Such petitions go first to every member of the court for examination, and are then separately considered in conference. This duty must be promptly discharged. We are not aided by oral arguments and necessarily rely in an especial way upon petitions, replies and supporting briefs. Unless these are carefully prepared, contain *appropriate* references to the record and present with *studied accuracy, brevity and clearness* whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket."

The fact that no supporting brief has been filed herein by petitioner to the end that both this court and these re-

spondents may ascertain the process of legal reasoning upon which petitioner founds its contention that it is enabled either upon the trust fund doctrine or otherwise to bring a suit directly upon Exhibits VII and VIII against the signers thereof as if petitioner were an actual party thereto, the further fact that it has continually shifted its position throughout this proceeding—adopting certain theories in one court only to abandon them in another—and the further fact that the present petition does not accurately disclose the real nature of the proceeding here involved nor the issues which were presented to and decided by the court below, places a burden upon these respondents, and indeed upon this court, which they or it should not be asked or required to assume.

A petition for writ of certiorari is an application to this court to review specific holdings of the court to which the writ is sought to be directed. It is not intended to provide means for a litigant, even though it be a Governmental agency like petitioner, to embark upon a process of evolving various theories limited only by the ingenuity of counsel in the hope that somewhere in the process of review some one or more of such theories will catch on. No more is a petition for certiorari intended as a means to a litigant merely for the purpose of securing a further or additional hearing of his claims. As this court so well said in *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163,

> "The jurisdiction [by certiorari] was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

The idea presented in its petition in this court that the court below in deciding this case has failed to follow the principles announced in *Erie R. R. Co.* v. *Tompkins* is a pure afterthought. It would be strange indeed were the court below to have fallen into such error in the face of the insistence on the part of the individual defendants herein that the case be decided in accordance with Illinois law—precisely what the court below ultimately did in its

application of the provisions of the 1919 Illinois Corporation Act.

In its present petition petitioner has attempted to camouflage the controversy between it and the individual defendants by claiming that it, as a creditor of C. T. C. Investment Company, is simply seeking to reach certain assets of the corporation which the individual defendants as stockholders have appropriated to themselves at petitioner's expense. In truth petitioner is attempting to bring suit upon contracts to which it is not a party. A mere cursory reading of the petition herein without knowledge of what this case is about might lead the reader to believe that the individual defendants as stockholders of C. T. C. Investment Company had entered into some fraudulent arrangement whereby they had taken over the assets of that company to the exclusion of its creditors. There is no such issue in this case, and no such controversy, and there is no such factual situation.

The judgment of the trial court in sustaining the motions to quash the purported service and return upon the C. T. C. Investment Company and dismissing the Complaint as against the individual defendants as the signers of Exhibits VII and VIII was plainly right. In affirming the judgment of the trial court, the court below was also plainly right.

The petitioner discloses no error in those holdings, and in any event, discloses no adequate grounds for the granting of certiorari.

Respectfully submitted,

LELAND K. NEEVES,
W. T. DURBIN,
HERBERT H. SCHEIER,
Counsel for Fletcher M. Durbin, Angus S. Hibbard, C. M. Moderwell, and John A. McCormick, Respondents herein.